PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Conolly, Michael J.
(Last) (First) (Initial)

Prisoner Number P-52999

Institutional Address CSP-Solano, P.O. Box 4000, Vacaville, CA 95696-4000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JOSEPH CONNOLLY,
(Enter the full name of plaintiff in this action.)

vs.

D. K. SISTO, Warden,

(Enter the full name of respondent(s) or jailor in this action)

CV 08 2797

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

RMW

(PR)

E-filing

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

San Mateo County Superior Court — Redwood City, CA

Court — Location

(b) Case number, if known SC052903A

(c) Date and terms of sentence January 16, 2004; 39 years to life.

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes xx No ____

Where?

Name of Institution: California State Prison - Solano

Address: P.O. Box 4000, Vacaville, CA 95696-4000

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Second degree murder with a knife (P.C. §§187(a), 12022(b)); prior serious felony (P.C. §667(a)); prior "strike" (P.C. §1170.12(c)(1)); 3 prior prison terms (P.C. §667.5(b)).

3. Did you have any of the following?

Arraignment: Yes XX No ____

Preliminary Hearing: Yes XX No ____

Motion to Suppress: Yes XX No ____

4. How did you plead?

Guilty ____ Not Guilty XX Nolo Contendere ____

Any other plea (specify) ____

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone____ Judge alone on a transcript ____

6. Did you testify at your trial? Yes XX No ____

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XX No ____

(b) Preliminary hearing Yes XX No ____

(c) Time of plea Yes XX No ____

(d) Trial Yes XX No ____

(e) Sentencing Yes XX No ____

(f) Appeal Yes XX No ____

(g) Other post-conviction proceeding Yes ____ No XX

8. Did you appeal your conviction? Yes XX No ____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes XX No ____

Year: 2006 Result: Affirmed

Supreme Court of California Yes XX No ____

Year: 2006 Result: Review denied

Any other court Yes ____ No XX

Year: ____ Result: ____

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes XX No____

(c) Was there an opinion? Yes XX No____

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes ____ No XX

If you did, give the name of the court and the result:

_____

_____

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: San Mateo County Superior Court

Type of Proceeding: Habeas corpus

Grounds raised (Be brief but specific):

a. Ineffective assistance of counsel: failure to properly move to strike a prior conviction.
b. Ineffective assistance of appellate counsel: failure to raise the issue of denial of motion to strike a prior.
c. Ineffective assistance of counsel: faiure to object to evidence of victim's character.
d. _____

Result: Denied Date of Result: February 16, 2007

II. Name of Court: Court of Appeal, First Appellate District

Type of Proceeding: Habeas corpus

Grounds raised (Be brief but specific):

a. All grounds same as in Superior Court.

b.

c.

d.

Result: Denied Date of Result: 4-19-07

III. Name of Court: California Supreme Court

Type of Proceeding: Habeas corpus

Grounds raised (Be brief but specific):

a. All grounds same as in Superior Court.

b.

c.

d.

Result: Denied Date of Result: 11-14-07

IV. Name of Court:

Type of Proceeding:

Grounds raised (Be brief but specific):

a.

b.

c.

d.

Result: Date of Result:

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes ____ No xx

Name and location of court:

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: See p. 8.

Supporting Facts:

Claim Two: See p. 11.

Supporting Facts:

Claim Three: See p. 13.

Supporting Facts:

Ground Four: p. 14; Ground Five: p. 18; Ground Six: p. 18.

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

All grounds have been presented to the highest state court.

List. by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

See Memorandum of Points and Authorities submitted herewith.

Do you have an attorney for this petition? Yes____ No XX

If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 2008

Date

Signature of Petitioner

(Rev. 6/02)

GROUND ONE

EXCLUSION OF EVIDENCE OF THE VICTIM'S AGGRESSIVE CONDUCT IN VIOLATION OF THE RIGHT TO PRESENT A DEFENSE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was charged with murder after stabbing his roommate George Celentano to death. Petitioner maintained that Celentano attacked him and that he acted in self-defense.

Evidence at the trial showed that petitioner and Celentano were friends. RT 1682. Witnesses agreed that Celentano was quite abusive verbally (RT 1683-84, 1694, 1730), but none had seen him engage in physical violence (RT 1683-84, 1714, 1850). Shortly before Celentano died, Max Toscano noticed petitioner and Celentano frequently arguing after Celentano objected to petitioner letting his ex-wife visit. RT 1832-35. Toscano thought that Celentano had asked her to leave, which upset petitioner. RT 1844. Because they were arguing so much, three days before Celentano's death, Toscano suggested to petitioner that he find a different place to live, because Celentano was so set in his ways. Celentano told petitioner that if he did not like the way things were run, he could leave. Petitioner replied, "One more time, that is all it is going to take." Then petitioner said, "I have other places to go, I don't need to put up with this kind of stuff." RT 3125-26.

Petitioner testified that he had known Celentano for 16 years and had lived with him at 43 Woodrow at various times over the years. RT 2810-11. In August, 2001, petitioner moved back to that address and stayed in a cottage at the back of the residence. RT 2814. Celentano had never been violent with petitioner. RT 2870-71.

Several weeks before Celentano's death, petitioner brought Cynthia Faddis, the mother of his daughter, to the house. Celentano objected. Petitioner indicated he could move out, since he wanted to be back with Faddis and his daughter anyway. RT 2818-19. When petitioner told Toscano that he was not

going to take it any more, he meant that he would move out; after making that remark, petitioner called Faddis to see if he could move back in with her. RT 2984.

During his most recent stay at 43 Woodrow, petitioner saw Celentano drinking a pint of vodka and some beers every day. RT 2823-24. Shortly before his death, Celentano entered a 21-day methadone program, something he had tried on a number of previous occasions. RT 2820-22. On Saturday, October 20, 2001, the day before the incident, petitioner noticed how heavily Celentano was drinking and told him to "slow down" so that he would not lose his methadone. RT 2825. The next day, petitioner did not see Celentano drinking. RT 2826.

On the night of the incident, petitioner had gone to the kitchen in the main house to use the microwave to make some soup. RT 2831. Celentano came in and began to argue; petitioner could not remember about what. A minute into the argument, Celentano "just completely freaked out," grabbed petitioner by the neck and attacked him with a knife. RT 2834. 20 years earlier, petitioner had been badly beaten and stabbed. RT 2835. He was terrified when Celentano came at him and "freaked out" himself. RT 2837. In the ensuing struggle petitioner stabbed Celentano to death. RT 2899, 2900-04.

When Celentano died, his blood alcohol level was 0.03. Dr. Gregory Hayner, an expert on alcohol withdrawal and its treatment, did not believe that this was a sufficient amount of alcohol to keep Celentano from going into alcohol withdrawal, assuming he was drinking 8 ounces or more of vodka per day near the time of his death. RT 2513-14, 2519-22.

Defense counsel sought to introduce evidence of an incident in 2000 when Celentano was hospitalized and became violent and irrational from alcohol withdrawal. (RT 2993-95, 3001, 3022; CT 353-359.) The trial court held a hearing to evaluate the admissibility of the evidence. The witnesses were Dr. James Chen, the treating physician, Olinda Menezes, a treating nurse, and Gregory

Hayner, chief pharmacist at the Haight-Ashbury Free Clinic Substance Abuse Treatment Services. They testified to the following:

On April 21, 2000, Celentano was admitted to Seton Hospital for alcohol-related gastrointestinal bleeding and episodes of losing consciousness. RT 2931, 2421. Earlier that day, he had ingested heroin and two beers. RT 2395. He had been trying to limit his alcohol intake to about 8 ounces of vodka a day. He also had several beers a day. RT 2514, 2518-19, 2524, 2999.

At 8:00 a.m. the following morning, Celentano was found walking the halls naked. He had torn out his IV's. He was alert and combative and could not be restrained. RT 2429, 2439, 2465. By "combative," Menezes meant that Celentano would try to hit a nurse with his fist if she tried to provide care. RT 2485. He threatened the nurses and had to be supervised by a security guard. He was a physical threat to hospital personnel and to himself. RT 2467. Restraints had to be ordered. RT 2429, 2474-75, 2479. He began receiving large doses of several medications, including Ativan, Valium, Haldol, and morphine. RT 2401-04, 2406-08, 2434.

By April 24, 2000, two days later, Celentano was still very combative. Dr. Chen ordered an endoscopy, but it could not be performed because of Celentano's aggressive behavior. RT 2432, 2442. "He became combative and began flailing and thrashing and striking the nurse." Defense Exhibit BB.

The trial court ruled the evidence inadmissible. RT 3022.

The California Court of Appeal found that the trial court's exclusion of the evidence of Celentano's prior violent behavior during alcohol withdrawal violated petitioner's constitutional right to present a defense, but found the error harmless. See unpublished opinion in People v. Connolly, No. A105806 (hereinafter "Opinion") at pp. 25-27.

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GROUND TWO

ADMISSION OF PETITIONER'S STATEMENT TO POLICE OBTAINED DURING A CUSTODIAL INTERROGATION IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

Petitioner was interrogated off and on by police for more than five hours, beginning around 3:00 a.m. RT 160-161. For the first fifty minutes, petitioner was uncomfortably handcuffed. RT 154, 159-160, 3130. After fifty minutes, he asked for a drink of water. RT 158-159, 3130. During the first hour and fifty minutes, he sat with Officer Alger. RT 141-142, 3130; CT 605-612.) Alger did not interview petitioner or give him the Miranda advisement. RT 2556.

When Detective Boffi arrived, he advised petitioner per Miranda v. Arizona, 451 U.S. 477 (1981), but failed to request a waiver. CT 614. Petitioner told Boffi he found Celentano on the floor and that he would have escaped if he had killed him. CT 614, 616. After several more minutes of questioning, petitioner said he would not say anything further without a lawyer. CT 617. The interview stopped. Petitioner asked Boffi whether he would be provided a lawyer at that time. Boffi replied, "No, we're not gonna wait just put your name here." CT 618.

A short time later, Alger reentered and greeted petitioner by saying, "What up, brother?" Petitioner asked if he could go to the bathroom. Alger said he could after Alger finished with a series of booking questions. CT 619. When petitioner said he was a veteran, Alger said it would give petitioner a "cushion" at the jail because a lot of the jail guards were veterans. He then said, "We try to do you a little favor, you know what I mean." CT 622. Petitioner asked several times whether Celentano was dead, what he was being charged with, and what the evidence showed. CT 619, 624. He asked if he could smoke a cigarette and again asked to go to the bathroom. CT 624-625. Alger left. RT 2565.

About one-half hour later, petitioner, still needing to go to the bathroom, whistled. Alger returned. About 48 minutes had passed since petitioner first asked to go to the restroom. RT 3130-31; CT 619. The police kept petitioner for three hours in the interview room before taking him to the restroom or allowing him a drink of water. RT 159, 168, 234, 2558-59, 3131.

As Alger and petitioner left the interview room for the restroom, Alger said, "I'll be honest with you." CT 626. Alger did not know what he had meant by this statement. RT 181, 2566. Once they left the interview room, their interactions were not recorded. Alger said that while they were in the restroom petitioner changed his mind and asked if he could speak with Boffi again. CT 626; RT 132-133, 136, 2372-73. Alger denied asking petitioner any questions in the restroom. He testified that petitioner asked if he could speak with the detective again. RT 132-133. Alger did not record any of this in his police report, even though he admitted it was important. RT 170.

After petitioner was returned to the interview room, Alger told Boffi he had established a rapport with petitioner. They decided Alger would conduct the next stage of the interview. RT 177, 2373-74. When he reentered the interview room, Alger made a show of having obtained two cigarettes for petitioner, pretending he would be in trouble if petitioner were discovered smoking. CT 626-627.

Alger then gave petitioner the Miranda admonition, but he too failed to obtain a waiver. CT 628-629. Petitioner insisted that he did not kill Celentano and that he found the body. CT 628, 645, 655, 659, 662-663. The reason he initially told Alger it was self-defense was because he was "scared because of his record." If he had killed Celentano, he would have run. CT 637. He also suggested that someone else in the house killed Celentano. CT 661, 665. Petitioner again requested an attorney. CT 667. The request was completely ignored. See CT 667 et seq.

Towards the end of the interview, petitioner requested an attorney for the third time: "Okay, so I'm gonna have to, I'm gonna talk to a lawyer and, and just go to Redwood City." The police again ignored the request. People's Exhibit 2; see CT 550. The prosecutor conceded that the questioning should have stopped at this point and agreed to redact everything that followed petitioner's third request for an attorney. RT 250.

Petitioner moved to suppress his statement to the police, claiming it was involuntary and violated Miranda. CT 269-280; RT 232-268. The trial court denied the motion on both grounds. CT 481; RT 268.

California Court of Appeal found no error in denial of petitioner's motion to suppress his statements to police. Opinion at 9-19.

GROUND THREE

EXCLUSION OF EVIDENCE REGARDING RELIABILITY OF PETITIONER'S STATEMENT AND INSTRUCTIONS THAT THE STATEMENT WAS VOLUNTARY VIOLATED THE RIGHT TO PRESENT A DEFENSE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

During his cross-examination of Officer Alger, defense counsel sought to question him about his knowledge that petitioner had invoked his right to counsel, and Boffi's and Alger's decision to re-Mirandize him. RT 2560-61. The trial court sustained the prosecutor's objections to this line of questioning, and explained to the jury that the questions were improper because they went to the "voluntariness" of petitioner's statement. The court further informed the jury that it had previously ruled that petitioner's statement was "voluntary." RT 2561-62.

Alger testified that he told petitioner a number of lies during the police interview. RT 2374, 2570-73. He testified that he lied when he told petitioner that he believed petitioner's original statement that he acted in self-defense. RT 2374. On cross-examination, defense counsel challenged Alger's credibility

and sought to show that Alger was telling the truth during the interview when he told petitioner he believed him, and lying at trial when he testified he did not. RT 2580, 2620-22. Counsel then attempted to cross-examine Alger about the propriety of lying to a suspect. RT 2576, 2579, 2581. The trial court sustained the prosecutor's objections to these questions on the ground that they, too, went to the voluntariness of petitioner's statement. RT 2576, 2578, 2580. The court again instructed the jury that petitioner's statement was "voluntary" and that Alger's lying was not improper because it did not render the statement involuntary. RT 2576, 2578, 2580.

Defense counsel objected to the trial court's actions and sought to explain that he was not relitigating the issue of voluntariness; instead, he was trying to explore the credibility of the officeers and the circumstances surrounding petitioner's statement. RT 2619-29. Counsel eventually moved for a mistrial, which was denied. RT 2630, 2642; see also RT 2631-41.

GROUND FOUR

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL:
FAILURE TO PROPERLY MOVE TO STRIKE A PRIOR SERIOUS FELONY CONVICTION
IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In an Amended Information filed in the San Mateo County Superior Court on January 7, 2003, (CT 156-161) petitioner was charged, inter alia, with having suffered a prior conviction of a violation of California Penal Code §245(A) in the San Francisco County Superior Court on April 1, 1980, a serious felony within the meaning of California's Three Strikes law (CT 158).

On October 17, 2003, defense counsel made a motion in limine to strike the 1980 prior conviction because it did not qualify as a "strike" prior. CT 282-284. In support of that motion counsel submitted a copy of the Information (CT 285-286) and a transcript of the change of plea proceeding wherein petitioner entered his plea of guilty to a violation of Penal Code §245(A)

pursuant to a plea bargain (CT 287-294).

The transcript of the change of plea proceeding shows that, on April 1, 1980, petitioner's attorney Harriet Ross stated the following:

> Mr. Connelly, I'm going to make a statement to the Court about your case. It's very important that you listen to it carefully.
> Your Honor, Mr. Connelly wants to enter a plea of guilty to the charge of assault with means likely to produce great bodily injury, a violation of section 245A of the California Penal Code, a felony. CT 288.

Counsel went on to apprise the court that she had told petitioner he would be giving up several constitutional rights by entering a plea of guilty to that charge if the court accepted the plea. CT 288-289. After describing for the court the advisements she had given petitioner, counsel told the court, "The plea is offered as a result of discussions with the District Attorney and the Court...." CT 289. When counsel completed her statement to the court, the following occurred:

> THE COURT: Thank you.
> Now, have you also advised Mr. Connelly, in addition to those matters set forth, that he has entered a plea of not guilty by reason of insanity, ... and have you advised him that in changing his plea he would be withdrawing his plea of not guilty by reason of insanity and that the Court --
> MS. ROSS: It slipped my mind, your Honor. I'm sorry.
> [¶]
> THE COURT: And, Mr. Connelly, I want you to understand if you withdraw that plea as well, that means that the issue of that plea of not guilty by reason of insanity would be not before the Court any longer, and that upon changing of the plea, then you are subjecting yourself to conviction on the underlying offense as set forth by Miss Ross, and do you understand that?
> CT 291.

Petitioner then withdrew his pleas of not guilty by reason of insanity and not guilty, after which the court stated, "You have heard the statements made to the Court by your counsel. Are they true in all respects?" After petitioner answered, "Yes," the court took petitioner's waiver of constitutional rights, then asked petitioner, "What is your plea to violating Section 245A of the Penal Code, a felony, as set forth in Count 3 of the information?" Petitioner

responded, "Guilty." CT 291-293.

Based on the court's discussion of the case with both counsel, the court found that there was a factual basis for the plea and thereby accepted it. CT 293. Count 3, as set forth in the Information, charged petitioner with "assault ... with a deadly weapon and instrument, to wit: a GUN" and contained an allegation of personal use of a firearm. CT 286. The firearm use allegation "inherent to Count 3" was stricken, and all other charges were dismissed on the prosecutor's motion. CT 294. As one of the terms of the plea agreement, petitioner was required to seek and undergo psychiatric treatment if given probation as a result of the conviction. CT 290.

At the hearing on the motion to strike, defense counsel argued the following points: (1) because the intent of the parties to the 1980 proceeding was for petitioner to plead guilty to assault without a deadly weapon, which is not a "strike," the record of conviction of assault with a deadly weapon was a clerical error, subject to correction to reflect the plea bargain (RT 334-335); and (2) the record of the prior conviction was too ambiguous to amount to sufficient evidence of a "strike" prior because not all §245(a) convictions were "strikes" (RT 344-345).

The trial court analyzed the authorities counsel relied on to support his second argument, and found them inapplicable to the circustances of petitioner's case. RT 348-353. In response to counsel's argument regarding the intent of petitioner and Ms. Ross at the time of the prior plea, the court stated, "It is not the intent of either of them, it's the plea that was entered to the charge." RT 355. The court wwent on to say that if petitioner wanted to challenge the prior based on what petitioner thought at the time he entered the plea, petitioner would have to attack the conviction in the San Francisco court. RT 356, 358. The court denied the motion, stating,

> What I am saying is as a matter of law it is a strike because

> what he pled to was a 245(a) deadly weapon, a firearm, and the rest of it is just -- the rest of it is for the [San Francisco] court to deal with. He needs to move to withdraw his plea and enter a new and different plea.
> RT 361.

On December 10, 2003, the jury found petitioner guilty of the charged crime. CT 739. On January 14, 2004, defense counsel filed a written "Trial Memorandum Re: Prior Conviction." CT 837-840. In that memorandum, counsel represented to the court that he had previously made a "Motion to Correct the Record" in the San Francisco County Superior Court, and that on September 13, 2002, that court had denied the motion. CT 839. Counsel went on to say that the judge who had denied the motion found that Ms. Ross should have made sure the Information was amended at the time petitioner entered his plea in 1980. CT 839-840. Based on that finding, counsel sought to challenge the prior conviction on the ground of ineffective assistance of counsel. CT 840.

The trial on the 1980 prior was held on January 16, 2004. CT 866-867. Counsel argued to the trial court that Ms. Ross was ineffective in the 1980 proceedings. RT 3368-70. The trial court rejected counsel's arguments, stating, "I don't feel that there is sufficient proof to make me doubt that the conviction was of a 245(a) deadly weapon firearm." RT 3376. Accordingly, the court found that the 1980 conviction was a "strike," and added a term of 20 years to life to petitioner's prison sentence as a result of that finding. RT 3376-77, 3387-88.

In 1980, Ms. Ross was familiar with section 245 of the California Penal Code, knew that a person could violate that section by committing either assault upon another person with a deadly weapon or by any means of force likely to produce great bodily injury, and knew the difference between the two allegations contained in the same section. Exhibit A ¶3. When Ms. Ross appeared in court with petitioner on April 1, 1980, she would not have told the court that petitioner's plea was to assault with means likely to produce great bodily

injury if that had not been the agreement with the District Attorney's office. Id. ¶4.

Petitioner's 1980 plea was based on an agreement that he would plead guilty to assault with force likely to produce great bodily injury, not assault with a deadly weapon. Ex. B ¶2. Petitioner was not informed before entering his plea of guilty to Count 3 of the Information that this count charged him with assault with a deadly weapon and had not been amended to reflect the plea agreement. Ibid. Petitioner assumed that changes in any court documents necessary to reflect the plea agreement had been made by the court and/or counsel, and pled guilty to Count 3 believing that it charged him with assault with force likely to produce great bodily injury. Ibid.

GROUND FIVE

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: FAILURE TO RAISE THE ISSUE OF IMPROPER DENIAL OF MOTION TO STRIKE THE PRIOR CONVICTION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioner incorporates by reference herein the facts stated in support of Ground Four of this Petition.

Appointed counsel did not raise on appeal any issues related to the trial court's denial of petitioner's motions to strike the 1980 prior conviction.

GROUND SIX

INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO OBJECT TO INTRODUCTION OF INADMISSIBLE EVIDENCE OF VICTIM'S CHARACTER IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner was charged with murder after stabbing George Celentano to death with a knife. Petitioner's defense was that the victim, an alcoholic who became delusional and aggressive when withdrawing from alcohol, was withdrawing from alcohol at the time of the incident. RT 1449-1450. As a result

of his alcohol withdrawal, the victim became enraged during a verbal argument with petitioner and attacked petitioner with a knife. RT 1453. During the ensuing struggle, petitioner stabbed the victim in self-defense. RT 1453-54.

In support of petitioner's defense, counsel sought to introduce evidence that showed the victim had become violent and aggressive on a previous occasion while suffering from alcohol withdrawal. RT 382; CT 353-359; see also facts in support of Ground One ante. The trial court deferred any ruling on admissibility of evidence of the victim's prior violent behavior until after petitioner testified. RT 448.

On direct examination of Joseph Chavez, the prosecutor elicited evidence that showed Chavez had known the victim for over 20 years (RT 1669), and in that time the victim had never become violent (RT 1683).

On direct examination of Alfred Sanchez, the prosecutor elicited evidence that Sanchez had known the victim for 25 years and had never seen the victim become violent towards anyone during that entire time. RT 1713-14.

On direct examination of Max Toscano, the prosecutor elicited evidence that Toscano had known the victim for approximately four years (RT 1817-18), and had never seen him become physically violent towards anyone during that time (RT 1850).

None of those witnesses were present at the residence when Celentano was killed. Defense counsel did not object to any of the testimony regarding the victim's non-violent character.

Petitioner testified that the victim had an alcohol problem in addition to being a heroin addict, and that the victim had entered a methadone program shortly before the incident. RT 2820. A rule for participation in a methadone program was that the participant not drink alcohol, and petitioner did not see the victim drink any alcohol on the day of the incident. RT 2822, 2825-26. On the night of the incident, petitioner and the victim had an argument. RT

2833. During the argument, Celentano "just freaked out" and attacked petitioner with a knife. RT 2834-35. During the struggle, petitioner stabbed him out of fear for his own life. RT 2837-38.

After petitioner's testimony, defense counsel renewed his motion for admission of evidence of the victim's prior violent acts during alcohol withdrawal. RT 2993. The trial court denied the motion and excluded the evidence. RT 3021-23. On petitioner's direct appeal, the California Court of Appeal found that the trial court's exclusion of the evidence was error, noting that petitioner's "sole theory to support an acquittal was that he acted in self-defense in response to the victim's irrational behavior [and] [no] evidence was presented to corroborate [his] version of the incident." Opinion at 25. In its rendition of the fact of petitioner's case the Court of Appeal relied on the testimony of Chavez and Sanchez regarding the victim's non-violent character (id. at 2-3), and relied on the testimony of all three of the prosecution witnesses noted above in finding the erroneous exclusion of defense evidence harmless (id. at 26).

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EXHIBIT A

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

MICHAEL J. CONNELLY,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO;
Respondent.

Case No. 101037 Writ #4401

DECLARATION OF HARRIET ROSS RE: PETITION FOR WRIT OF HABEAS CORPUS

DATE: JULY 24, 2002
TIME: 2:00 P.M.
DEPT: 22

I, Harriet Ross, declare that:

1. I am an attorney at law authorized to practice law in the State of California and I was the attorney for petitioner, in the case entitled "The People of the State of California v. Michael J. Connelly," Case #101037, which was pending in the Superior Court of California, County of San Francisco.

2. I have reviewed a copy of the information and the Reporter's Transcript of the proceedings dated April 1, 1980.

3. As of April 1, 1980, I was familiar with §245 of the Penal Code and I knew that a person could violate that section by committing either an assault upon another person with a deadly weapon or by any means of force likely to produce great bodily injury. I knew the difference between the two allegations contained in the same section.

4. When I appeared in court with the defendant on April 1, 1980, and the case was called by the court, I indicated to the court that "The defendant at this time would make a motion to withdraw his plea to Count III of the information with the gun allegation deleted." See: Exhibit "B", Page 1, Lns. 7-11, which is attached to petitioner's Petition for Writ of Habeas Corpus. I then indicated to the court that Mr. Connelly wanted to enter a plea of guilty to the charge of assault with means likely to produce great bodily injury, in violation of § 245(a) of the California Penal Code, a felony. As part of the advise of rights given by myself to the defendant in open court, I so informed the defendant. I knew the difference between an assault with a deadly weapon and an assault with means likely to reduce great bodily injury. I would not have told the court that the plea was an assault with means likely to produce great bodily injury if that had not been the agreement with the District Attorney's Office. See: Exhibit "B" Page 1, Lns. 24-17, which is attached to petitioner's Petition for Writ of Habeas Corpus.

5. When the court took Mr. Connelly's plea, the court merely stated, "Then, Michael Connelly, what is your plea to violating §245 of the Penal Code, a felony, as set forth in Count III of the information?" See: Reporter's Transcript, Page 6, Lns. 14-16, attached as Exhibit "B" to petitioner's Petition for Writ of Habeas Corpus. In my opinion, if the District Attorney had wanted the defendant to plead guilty to an assault with a deadly weapon, the court would have then been specific in taking the defendant's plea and asking the defendant if he plead guilty to violating §245(a) of the Penal Code, which is alleged as assault with a deadly weapon. I believed that the court did not do that since it was previously stated by myself that the defendant was going to plead to a violation of that section as an assault with means likely to produce great bodily injury.

6. I believe that the error in the record was an oversight by the court and that counsel and/or the court must have been distracted and it was merely an oversight that Count III was not officially amended on the face of the information.

I declare under penalty of perjury that the foregoing is true except as to those matters I allege on information and belief, and as to those matters I believe them to be true.

Executed on July 12, 2002, at San Francisco, California.

/s/
HARRIET ROSS

EXHIBIT B

DECLARATION OF MICHAEL JOSEPH CONNOLLY

1. I am the petitioner in the Petition for Writ of Habeas Corpus submitted herewith.

2. My 1980 plea was based on an agreement that I would plead guilty to assault with force likely to produce great bodily injury, not assault with a deadly or dangerous weapon. I was not informed before entering my plea of guilty to Count Three of the Information in that case that this count charged me with assault with a deadly weapon and had not been amended to reflect the plea agreement. I assumed that changes in any court documents necessary to reflect the plea agreement had been made by the court, my attorney or the prosecutor, and pled guilty to Count Three believing that it charged me with assault with force likely to produce great bodily injury.

3. Although between 1980 and 2001 I was convicted and sentenced to prison several times, at no time until the current conviction had the 1980 prior been used as a serious prior conviction for the purpose of sentence enhancement.

4. In the course of investigation and preparation of the claims raised in this Petition, I wrote attorney Harriet Ross who represented me in the 1980 proceedings and asked her whether she would execute a declaration substantially similar to that submitted herewith as Exhibit A. As I could not locate Ms. Ross in the current lawyers' directory in the prison library, I wrote her to the address indicated on the proof of service of her 2002 declaration. To date, I have not received any response to that letter. Exhibit A contains a true and correct copy of the Declaration of Harriet Ross Re: Petition for Writ of Habeas Corpus, which I received from my trial counsel's office before my trial. It is the only copy of that Declaration I could locate.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 18, 2008, at Vacaville, California.

Michael Joseph Connolly

Michael Joseph Connolly

Michael J. Connolly
P-52999
California State Prison - Solano
P.O. Box 4000
Vacaville, CA 95696-4000

Petitioner pro se

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JOSEPH CONNOLLY,

Petitioner,

v.

D. K, SISTO, Warden,

Respondent.

No. _____

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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Michael J. Connolly
P-52999
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Vacaville, CA 95696-4000

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IN THE UNITED STATES DISTRICT COURT

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MICHAEL JOSEPH CONNOLLY,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

GROUND ONE

EXCLUSION OF EVIDENCE OF THE VICTIM'S AGGRESSIVE CONDUCT IN VIOLATION OF THE RIGHT TO PRESENT A DEFENSE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence violates both the Fourteenth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense. Chambers v. Mississippi, 410 U.S. 284, 294 (1973): Washington v. Texas, 388 U.S. 14, 18-19 (1967).

As shown by the supporting facts, the state court found that the trial court's exclusion of the evidence of Celetano's prior violent behavior was constitutional error, but harmless under Chapman v. California, 386 U.S. 18, 23 (1967). Accordingly, the first inquiry is whether or not the state court's ruling was an unreasonable application of the Chapman harmless error test.

Mitchell v. Esparza, 540 U.S. 12, 18 (2003); 28 U.S.C. §2254(d). Below, petitioner will show that it was.

The harmless error test of Chapman, supra, requires that the People prove beyond a reasonable doubt that the error did not contribute to the verdict in the case. Id. at 24. In conducting the harmless error analysis the state court engaged in what can only be characterized as an evaluation similar to that contemplated by a challenge to the sufficiency of the evidence under Jackson v. Virginia, 443 U.S. 307, 319 (1979): the court took all inferences from the evidence in favor of the prosecution, ignoring defense evidence that allowed for an alternative interpretation that favored petitioner's version of events, then ruled the evidence overwhelming. Opinion at 25-27.

In Sullivan v. Louisiana, 508 U.S. 275, 279 (1993), the Court ruled that the inquiry under Chapman

> is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.

The right to a jury trial, the Court concluded, "requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal." Id. at 280. In sum, the test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in petitioner's case.

As the state court rightly noted, petitioner's "sole theory to support an acquittal was that he acted in self-defense in response to the victim's irrational behavior [and] [n]o evidence was presented to corroborate [his] version of the incident." Opinion at 25. That observation alone defeats the

conclusion that there is no reasonable probability that the erroneous exclusion of the only evidence that would have corroborated petitioner's testimony could not have contributed to the verdict. Accordingly, the state court's application of Chapman was objectively unreasonable, and §2254(d) does not preclude relief.

The question before this Court is whether the error in exclusion of crucial corroborative defense evidence had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). The State bears the burden of proving the error harmless under the Brecht harmless-error test. Payton v. Woodford, 346 F.3d 1204, 1216-17 (9th Cir. 2003)(en banc), citing O'Neal v. McAninch, 513 U.S. 432, 437-445 (1995).

Petitioner claimed self-defense. He testified that Celentano suddenly and inexplicably attacked him in the kitchen with a knife. Based on what the jury knew of Celentano, this was uncharacteristic conduct: Celentano was a 67-year-old heroin addict who was known to be verbally abusive, but not violent or aggressive. Petitioner's self-defense claim, therefore, depended on the jury understanding that Celentano was capable of such violence and aggression, i.e., that he had a trait for it when withdrawing from alcohol. Without such knowledge, the jury would have found it difficult, if not impossible, to believe that Celentano attacked petitioner without provocation. The error in exclusion of the evidence eviscerated petitioner's defense.

In addition, contrary to the state court's rendition of the evidence, the prosecution's case was not overwhelming. The prosecutor's own experts conceded that the physical evidence was consistent with petitioner's description of Celentano's attack and his claim of self-defense.

Petitioner respectfully submits that, given the facts of his case, the error complained of herein cannot be deemed harmless. Accordingly, petitioner

is entitled to habeas relief.

GROUND TWO

ADMISSION OF PETITIONER'S STATEMENT TO POLICE OBTAINED DURING A CUSTODIAL INTERROGATION IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that any statement obtained by an officer from a suspect during custodial interrogation may be admitted in evidence only if the officer advises the suspect of both his right to remain silent and the right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer. The Court also held that if the suspect indicates that he does not wish to speak to the officer or wants to have counsel present at questioning, the officer must end the interrogation. Id. at 444-445.

Once having invoked these rights, the accused "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). The initiation of further dialogue by the accused, however, does not in itself justify re-interrogation. Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983). "[E]ven if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel, is initiated by the accused, where re-interrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." Ibid.

Under these principles, the trial court erred. Although it does not appear to have made an express finding, the trial court implicitly found petitioner reinitiated further contact with the police when he and Alger went to the restroom. See RT 253-268. In doing so, the trial court ignored several

important facts that, when taken together, demonstrate a violation of Edwards, supra.

First, there were the circumstances surrounding the purported re-initiation. Petitioner sat, uncomfortably handcuffed, for almost two hours before he was advised per Miranda. Within seven minutes of the advisement, he requested an attorney. Around the same time, he asked to go to the bathroom. The police made him wait another 50 minutes. RT 3131. All told, the police kept petitioner for three hours in the interview room before taking him to the restroom or allowing him a drink of water. RT 158-159, 168, 234, 2558-59, 3130-31.

As petitioner and Alger left for the bathroom, Alger made a suspicious remark--"I'll be honest with you"--that he was unable to explain. Then, once in the bathroom--the only time petitioner and the police were not monitored by a video recorder--petitioner supposedly voluntarily waived his previous request for counsel and asked to speak with Detective Boffi again. Incredibly, Alger never recorded this incident in his police report, even though he acknowledged its importance.

After petitioner's first request for an attorney, the police stopped the interrogation, but they did not stop questioning him. As soon as petitioner requested counsel, Alger began asking him a series of "booking" questions which, while technically legal, appeared aimed at undermining petitioner's request for counsel. Petitioner was a "talker," and it appears from the record that the police used the excuse of booking questions to get him talking again. They also used it as another opportunity to "soften up" petitioner. When Alger learned that petitioner was a veteran, he said it would help him in the jail and added that "We try to do you a little favor." CT 622. Alger also pretended to go to great lengths to get petitioner a cigarette, claiming he risked getting in trouble himself.

At the same time, the police used the opposite tactics of discomfort and duress. Petitioner was not provided water or a restroom for the first three hours of the interview. Once he asked for water, he was made to wait another two hours. And once he asked to go to the bathroom, he was made to wait another 50 minutes. He was kept uncomfortably handcuffed in the interview room in the middle of the night for more than five hours.

Finally, the state court failed to consider the fact that the police ignored petitioner's second and third requests for an attorney.

Taken together, these facts show a course of police misconduct that the trial court failed to consider in denying the motion. In light of those facts, Alger's testimony that petitioner reinitiated the police interview in the restroom becomes inherently incredible, and appears to have been part of a concerted effort by the police to continue the interview despite petitioner's repeated requests for counsel.

The California Court of Appeal repeated the trial court's errors. See Opinion at 9-19. In addition, it failed to consider the fact that petitioner's second request for counsel was ignored by the police, even though this omission was brought to its attention. The Court of Appeal also erred in discounting the discomfort and duress that petitioner was subjected to; its finding that petitioner had not been denied access to water or restroom "for any significant period of time" is contrary to the clear and convincing evidence in the record. See RT 158-159, 168, 234, 2558-59, 3130-31; cf. Opinion at 19. Accordingly, the opinion of the Court of Appeal is entitled to no deference under 28 U.S.C. §2254(d).

The erroneous denial of petitioner's motion to suppress the statement to police is subject to harmless error analysis under the standard of Brecht v. Abrahamson, 507 U.S. at 637. Petitioner's interview with the police hurt his credibility with the jury. Before the interview and later at trial,

petitioner was consistent in his claim of self-defense. He told the dispatcher and Alger that he killed Celentano in self-defense. He said the same thing at the trial. During the police interview, however, he repeatedly lied, claiming he found Celentano already dead. Worse still, he openly tried to calculate what the best defense would be given the law and the evidence against him. He looked like someone with much to hide rather than an innocent man determined to tell the truth.

Since there were no witnesses, petitioner's defense hinged on his credibility. The police interview undermined it. Since he lied to the police, the jury would have been hard pressed to credit his account at trial. Given these circumstances, respondent cannot prove that the erroneous admission of petitioner's statement did not have a substantial and injurious effect or influence on the verdict, and petitioner is entitled to habeas relief.

GROUND THREE

EXCLUSION OF EVIDENCE REGARDING RELIABILITY OF PETITIONER'S STATEMENT AND INSTRUCTIONS THAT THE STATEMENT WAS VOLUNTARY VIOLATED THE RIGHT TO PRESENT A DEFENSE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In Crane v. Kentucky, 476 U.S. 683 (1986), the Supreme Court held that a finding that a statement is voluntary does not preclude an attack on its reliability at trial. Id. at 687. In so holding, the Court made clear that though voluntary, a confession nonetheless could be false, unreliable, insufficiently corroborated, or "unworthy of belief." Id. at 689-691. The Court thus distinguished between coercion that violated the Constitution and rendered a statement involuntary and inadmissible, and lesser forms of pressure that, though not unconstitutional, could nonetheless result in an untrustworthy confession. Id. at 689. The Court held that by excluding defense testimony "bearing on the circumstances under which the confession was obtained," the

trial court violated the defendant's Fifth, Sixth, and Fourteenth Amendment rights to a meaningful defense. Id. at 685-686, 690-691.)

The same error occurred in petitioner's trial when the trial court barred petitioner from inquiring into the circumstances surrounding his several Miranda admonishments. More importantly, it barred him from questioning Alger about his claim that he lied to petitioner during the interview, and the propriety of such lying, although this is precisely the type of subject matter that Crane held relevant and admissible.

The trial court also erred by instructing the jury that petitioner's statement was voluntary. The distinction that the Supreme Court drew in Crane between the voluntariness of a suspect's statement or confession and its reliability is a subtle one. It recognizes that a suspect's statement may be voluntary at the same time it is unreliable, even false, because of any number of factors, including coercive police practices that fall short of those that are constitutionally condemned. The distinction is not altogether intuitive, because one does not expect a voluntary confession to be unworthy of belief. Put differently, if a confession is rendered unreliable because of police pressure, one would expect it to be involuntary. Crane, however, clearly said that this is not necessarily the case. 476 U.S. at 689.

Given this subtle distinction, the trial court erred when it instructed the jury that petitioner's statement was "voluntary," because it failed to explain that the jury still had to determine whether the statement was unreliable because of the physical and psychological circumstances surrounding it. The jury would have assumed that "voluntary" meant "reliable," and that the various factors that petitioner tried to highlight--his discomfort, his need to go to the bathroom, the lack of water and sleep, and the officers' deceptive practices and softening up--were irrelevant to anything he said.

The trial court erred again when it instructed the jury that it was not

improper for Alger to lie. The statement endorsed Alger's testimony that he was lying, and deprived petitioner of his ability to challenge that contention. Moreover, it was incorrect. Alger's claimed deceptiveness may not have rendered petitioner's statement involuntary, but that did not make it proper or bar petitioner from challenging its credibility. Deceptive police practices can lead to a finding of involuntariness, and, of course, unreliability. Moran v. Burbin, 475 U.S. 412, 421 (1986)("The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.")

The court here thought that any attack on the circumstances surrounding petitioner's statement and its reliability was an attack on the court's prior finding that the statement was voluntary. In a colloquy with defense counsel, the court revealed much of its confusion: it thought that reliability addressed only the question whether the confession occurred as the police reported, and that where, as here, the confession is recorded, reliability is not an issue. RT 2635 ("But the tape pretty much precludes any kind of realistic assault on that"), 2637-38.

The California Court of Appeal upheld the trial court in a decision that avoided petitioner's argument and cannot withstand scrutiny. Opinion at 27-31. That court rejected petitioner's argument merely by distinguishing this case from Crane. In so doing, the court ignored petitioner's arguments that the trial court erred in instructing the jury that petitioner's statements were voluntary, and that the police were entitled to lie. It simply refused to address these specific contentions and whether they in fact are contrary to Crane's holding allowing a defendant to attack the reliability of a statement.

The error violated petitioner's due process and Sixth Amendment right to present a defense. Crane, supra, 476 U.S. at 690. The error was prejudicial under Brecht, 507 U.S. at 637, and the state court's finding with regard to

this claim was objectively unreasonable under 28 U.S.C. §2254(d). Accordingly, petitioner is entitled to habeas relief.

GROUND FOUR

INEFFECTIVE ASSISTANCE OF COUNSEL:
FAILURE TO MOVE TO STRIKE A PRIOR SERIOUS FELONY CONVICTION
IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In order to prevail on this claim of ineffective assistance of counsel, petitioner must demonstrate that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Below, petitioner will show that counsel's attempts to convince the trial court to strike the 1980 prior "strike" conviction "fell below an objective standard of reasonableness" of representation. Id. at 688. Thereafter, petitioner will demonstrate that, had counsel acted consistently with prevailing professional norms, he could have successfully moved to strike the prior under either one or both of two clearly established legal theories, an outcome of the proceeding sufficiently different to satisfy the second prong of the controlling test. Id. at 694.

Among defense counsel's duties evaluated under the performance prong of the Strickland test is the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. The aspect of the trial relevant here is the motion to strike a prior conviction which counsel was entitled by state law to make in the trial court. See People v. Allen, 21 Cal.4th 424, 435, 440 (1999). As will be shown below, counsel's litigation of the motion to strike was so objectively unreasonable that it can be explained only by complete ignorance of the applicable law.

The supporting facts show that counsel attempted to challenge the prior conviction twice. The written notice of counsel's in limine motion and its supporting memorandum of points and authorities unequivocally asked the trial

court to strike the 1980 Penal Code §245(a) conviction on the ground of "insufficiency of the evidence to prove that the prior conviction was a strike." CT 282-284. By California law, an assault with a deadly weapon is a serious felony, i.e., a "strike" within the meaning of the Three Strikes law (Cal. P.C. §§ 667(a)(1)&(d)(1), 1192.7(c)(31)); the abstract of judgment in the 1980 proceedings reflected a conviction of "assault deadly weap" (CT 495); such an unambiguous notation in an abstract of judgment constitutes sufficient evidence of a "strike" prior (People v. Rodriguez, 17 Cal.4th 253, 261 (1998)); therefore, it would have been objectively unreasonable for any competent attorney to attempt to raise a sufficienty of the evidence challenge to the 1980 conviction. Nevertheless, that is precisely what counsel's argument at the hearing on this motion amounted to: although counsel did refer to the intent of the parties, the only explicit legal ground for the motion to strike was that of insufficient evidence. RT 334-345. Not surprisingly, the trial court pointed out that defense counsel's own authorities defeated his argument, and found the evidence sufficient to support the finding of a "strike" prior. RT 348-355, 361.

Counsel's second attempt, made after petitioner had been found guilty of the substantive charge of murder, was in no way more reasonable and showed the same fundamental lack of understanding of the applicable law. Counsel's confusion is evident from the trial memorandum he filed with the court: he gave notice of his intention to prove that petitioner had not been convicted of violating "Section 245(A) of the Penal Code on April 1, 1980" (CT 837); admitted that petitioner had pled guilty to, and was convicted of, a violation of §245(a) in the 1980 proceeding (CT 838); argued that petitioner's 1980 counsel Harriet Ross was ineffective because she did not ensure that conviction was properly recorded by the rendering court (CT 839-840); and concluded that, because "the allegation that the defendant committed the assault with a deadly

weapon" had been stricken by the rendering court, "there was a complete failure of proof by the [P]eople that this was a serious felony within the meaning of the law" (CT 840). The relevant facts, and counsel's own admission, show that petitioner had in fact been convicted of a violation of California Penal Code §245(a), which in 1980 included assault with and without a deadly weapon. CT 495, 838; see Ann. Cal. P.C. §245. A claim of ineffective assistance of Ms. Ross was not cognizable in the trial court. Custis v. United States, 511 U.S. 485 (1994); Garcia v. Superior Court, 14 Cal.4th 953, 963 (1997). The statement that an allegation of use of a deadly weapon had been stricken was simply false. Cf. CT 294. Thus, it is not surprising that the trial court chose to construe counsel's argument as another attempt to challenge the sufficiency of the evidence, and made the obvious ruling thereon. RT 3376.

In sum, the supporting facts show that (1) counsel attempted to utilize the fact that petitioner entered into the 1980 plea agreement with the understanding that he was pleading to an assault with force likely to produce great bodily injury, and (2) the only legal conclusions counsel drew from that fact were patently inapplicable or procedurally barred, resulting in denial of his motions. Accordingly, counsel's decision to pursue those legal arguments can be explained only by his ignorance of the law, making his performance unreasonable "under prevailing professional norms." Strickland, 466 U.S. at 688.

In order to prevail on the prejudice prong of the Strickland test, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "In making the determination whether the specified errors resulted in the required prejudice, a court should presume ... that the judge or jury acted according to law." Ibid. Below, petitioner will show that the circumstances of his 1980 conviction, viewed from the standpoint of two discrete legal concepts, demand the dismissal of the "strike" allegation.

The presumption that the trial court would have followed the law had counsel raised the appropriate legal challenges makes the probability of a different outcome (and a significantly lower sentence) objectively reasonable under Strickland, 466 U.S. at 693-695.

(a) THE PLEA TO ASSAULT WITH A DEADLY WEAPON WAS NOT VOLUNTARY AND INTELLIGENT

"A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.' Brady v. United States, 397 U.S. 742, 748 (1970). Where defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid. Henderson v. Morgan, 426 U.S. 637, 645 (1976)." Bradshaw v. Stumpf, 545 U.S. __, 125 S.Ct. 2398, 2405 (2005). The courts usually rely on defense counsel to inform the defendant "of the nature and elements of the charge to which he is pleading guilty" and presume that the defendant voluntarily and intelligently pled to the charge so explained to him by counsel. Id., 125 S.Ct. at 2406; Henderson, 426 U.S. at 647. If, however, the record shows that neither the defndant nor his attorney correctly understood the essential elements of the charge, the guilty plea is invalid under the Due Process Clause of the Fourteenth Amendment. Bousley v. United States, 523 U.S. 614, 619 (1998).

A claim that the plea was invalid under Henderson, supra, can be properly raised in the trial court in a motion to strike a prior conviction pursuant to People v. Sumstine, 36 Cal.3d 909, 916 (1984). People v. Dolliver, 181 Cal.App.3d 49, 60-61 (1986). Such a motion challenging the voluntariness of the plea that resulted in the prior conviction can be supported by the record of the prior proceeding as well as by evidence outside that record. People v. Allen, supra, 21 Cal.4th at 440.

The supporting facts show that when petitioner entered his guilty plea on April 1, 1980, he, his attorney, and the trial court believed that he was pleading guilty to assault with force likely to produce great bodily injury. According to the direct evidence in the record, that was the charge of whose "elements," "possible defenses," and "legal consequences" counsel informed petitioner (CT 288-289); the court advised petitioner that by changing his plea he would be "subjecting [him]self to conviction on the underlying offense as set forth by Miss Ross" (CT 291)(emphasis added), and asked petitioner to acknowledge the truth of "the statements made to the Court by [his] counsel" (CT 292). The prosecutor did not object to counsel's identification of the charge nor to the court's reliance thereon. CT 288-294. In addition to the record evidence, both Ms. Ross and petitioner declared under penalty of perjury (and thus, presumptively, would have testified at the hearing in the trial court) that petitioner's guilty plea was based on the understanding that the charge he would be convicted of was that of assault with force likely to produce great bodily injury, not assault with a deadly weapon. See Petition Exhibits A, B.

There is no evidence that petitioner, who was in need of psychiatric help at the time (CT 290; cf. Henderson, 426 U.S. at 645-646), was given any notice that--contrary to his attorney's explanation, openly endorsed by the court and not contradicted by the prosecutor--his guilty plea would result in a conviction of assault with a deadly weapon. Accordingly, his plea was neither voluntary nor knowing and intelligent, the 1980 conviction was obtained in violation of due process, and the serious felony enhancement allegation in the trial court was subject to being stricken upon a motion supported by the facts and the law outlined above.

(b) THE 1980 PLEA AGREEMENT WAS VIOLATED

Plea agreements are contractual in nature and are measured by contract

law standards. United States v. Keller, 902 F.2d 1391, 1393 (9th Cir. 1990). The terms of oral plea agreements are enforceable as are those of any other contract. See, e.g., United States v. Monreal, 301 F.3d 1127, 1133 (9th Cir. 2002). In this context, state contract law is controlling. Buckley v. Terhune, 441 F.3d 688, 694-695 (9th Cir. 2006)(en banc); see also Ricketts v. Adamson, 483 U.S. 1, 6 (1987)(holding that the interpretation of state plea agreements is a matter of state law).

Under California law, a contract must be interpreted so as "to give effect to the mutual intention of the parties as it existed at the time of contracting" (Cal. Civil C. §1636), and any ambiguity in the agreement should be resolved in petitioner's favor (Buckley, 441 F.3d at 698).

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). What induced the plea is an objective inquiry: "Where it is clear from context what would reasonably have prompted acceptance of the agreement, even in part, no further speculative factual inquiry is needed." Brown v. Poole, 337 F.3d 1155, 1160 (9th Cir. 2003), citing INS v. St. Cyr, 533 U.S. 289, 322-323 (2001).

As shown by the transcript of the April 1, 1980, change of plea proceeding, petitioner's attorney Harriet Ross stated to the court that the plea agreement being offered to petitioner was the "result of discussions with the District Attorney and the Court" (CT 289), and consisted of petitioner pleading guilty to "assault with means likely to produce great bodily injury a violation of section 245A" of the California Penal Code (CT 288). Before finalizing and accepting the plea agreement, the court confirmed that all of the statements made by Ms. Ross were true (CT 292), and that petitioner's change of plea would "subject[] [petitioner] to conviction on the underlying offense

as set forth by Miss Ross" (CT 291).

It cannot reasonably be disputed that the transcript of the 1980 change of plea demonstrates that the intent of the parties at that time was that, in exchange for petitioner's plea of guilty to assault with force likely to produce great bodily injury in violation of Penal Code §245(a), the prosecutor would rescind the original charge of assault with a deadly or dangerous weapon, a gun, strike the special allegation of personal use of a firearm inherent in that charge, and dismiss the remaining charges.

Under California law, an assault committed "by any means of force likely to produce great bodily injury" is not a "strike" (Williams v. Superior Court, 92 Cal.App.4th 612 (2001)), and it does not qualify as a serious felony for purposes of imposing a 5-year enhancement under Penal Code §667(a)(1).

In Davis v. Woodford, No. 05-55164, 2006 DJDAR 5033, 5035 (9th Cir. 2006) the court held "that the state must live with the particular bargain it made." The trial court violated petitioner's 1980 plea agreement by counting the prior conviction as a serious felony under the Three Strikes law and Penal Code §667(a)(1), and adding 20 years to life to petitioner's sentence as a result.

Trial counsel's motion to strike the prior conviction on either of these two grounds was reasonably likely to succeed. Accordingly, counsel was prejudicially ineffective, the state courts' denial of this claim was an unreasonable application of Strickland, and petitioner is entitled to relief.

GROUND FIVE

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: FAILURE TO RAISE THE ISSUE OF IMPROPER DENIAL OF MOTION TO STRIKE THE PRIOR CONVICTION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 391-405 (1985). The standard for measuring

a claim of ineffective assistance of appellate counsel is the two-prong test set forth in Strickland v. Washington, supra: petitioner must prove that his counsel's performance fell below an objective standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability that petitioner would have prevailed on appeal. Id., 466 U.S. at 688, 694; see Miller v. Keeney, 882 F.2d 1428, 1433-34 (9th Cir. 1989). The likelihood of success of the underlying claim can be evaluated under the federal Constitution or state law. Miller, 882 F.2d at 1435.

As shown by the supporting facts, petitioner's trial counsel's attempts to litigate the motion to strike the prior conviction allegation included the mention of petitioner's, his attorney's and, generally, the parties' intent to enter a plea of guilty to assault with force likely to produce great bodily injury. RT 334-335; CT 283, 839, 840. Although largely incoherent and expressly based on improper legal grounds, counsel's arguments did invite the trial court to decide whether the record of the 1980 change of plea proceeding showed that a conviction of assault with a deadly weapon was contrary to the parties' intent and/or petitioner's understanding of the nature of the charge to which he was pleading guilty.

If this Court finds that trial counsel thereby fulfilled his obligations and, accordingly, denies the claim raised in Ground Four of the Petition, petitioner respectfully submits that such finding would necessarily mean that appellate counsel's failure to raise the claim of improper denial of the motion to strike the prior based on the violation of the plea agreement and an involuntary guilty plea amounted to prejudicially ineffective assistance. If trial counsel did not fail in his duties, then this claim was cognizable on direct appeal:

> As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to

> one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.
> People v. Yeoman, 31 Cal.4th 93, 117 (2003).

Appellate counsel could have addressed the claims essentially identical to those outlined in Ground Four of this Petition by complaining of the trial court's improper denial of, or refusal to conduct a hearing on, a motion to strike a prior conviction authorized by People v. Allen, supra, 21 Cal.4th at 440, and People v. Sumstine, supra, 36 Cal.3d at 916. As noted in the supporting facts, the trial court stated that such a motion could have been raised only in the rendering court (RT 356, 358, 361); since Allen expressly held otherwise, controlling law would have mandated reversal of that ruling, while the implicit ruling on the merits of the underlying claims would have been reversed for the reasons stated in Ground Four ante and incorporated by reference herein.

Accordingly, appellate counsel was ineffective, state courts' denial of this claim was objectively unreasonable (28 U.S.C. §2254(d)), and petitioner is entitled to relief.

GROUND SIX

INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO OBJECT TO INTRODUCTION OF INADMISSIBLE EVIDENCE OF VICTIM'S CHARACTER IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As stated above, in order to prevail on a claim of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and the deficiency was prejudicial. Strickland, 466 U.S. at 687-688, 694.

At issue here is the admission of evidence of the victim's character or trait of character for non-violence whose only conceivable relevance was

to show that on the night he was killed he acted in conformity with that general character, i.e., did not violently assault petitioner and force the latter to defend himself with lethal force. California Evidence Code §1101(a) states the following:

> Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Of the sections listed therein, only §1103 mentions a victim's character:

> (a) In a criminal action, evidence of the character or a trait of character ... of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:
> (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
> (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

This exception is inapplicable because in petitioner's trial no evidence of George Celentano's character was adduced by petitioner. As shown by the supporting facts, petitioner sought to introduce evidence of the victim's acts of violence under this section; however, the trial court deferred its ruling until after petitioner testified (RT 448), and then refused to allow petitioner to support his defense with such evidence (RT 3021-23; see also facts in support of Ground One). By then, all of the prosecution's evidence of the victim's non-violent character had already been presented to the jury.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Viewed in such a manner, an objectively reasonable course of action for a competent attorney representing petitioner would have been as follows: (1) once the trial court deferred its ruling regarding introduction of defense

evidence (thus indicating that it may ultimately be denied), object to any prosecution evidence of the victim's character as inadmissible under California Evidence Code §1101(a) until and unless the court admits defense evidence that would qualify under §1103(a)(1); (2) if the objections to the prosecution evidence are overruled, after the court made its final ruling excluding the defense evidence, move for a mistrial and/or request an instruction directing the jurors not to consider the evidence of the victim's non-violent character for any purpose. Petitioner's trial counsel did neither, leaving the inadmissible evidence unchallenged and the claim of its improper admission forfeited for appeal. This omission fell below the standard of "reasonably effective assistance" which governs the first prong of the Strickland test. Id., 466 U.S. at 687.

The ultimate question in any ineffective-assistance claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 692-693. "The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 694.

Petitioner respectfully submits that the prejudice prong of the Strickland test can be satisfied even if the effect of the improperly admitted evidence is viewed in isolation. As noted in the supporting facts, petitioner's defense at the trial was that he had killed Celentano while defending himself from an unprovoked attack. The California Court of Appeal aptly identified the major problem with that defense: petitioner "was considerably bigger, stronger, and younger than Celentano, a 67-year old alcoholic and heroin addict who, though sometimes verbally abusive, was not known for being physically aggressive or violent." Opinion at 26. Petitioner testified that Celentano had attacked

him with a knife. RT 2834-35. The jury was instructed that a person attacked in such a manner could lawfully kill the assailant and did not need to retreat even if the assailant was not actually capable of inflicting great bodily injury. CT 773, 775, 778, 779. Accordingly, the fact that petitioner was 16 years younger and in better physical shape than the victim was of almost no relevance to the success of petitioner's defense: if the jury believed petitioner's testimony describing the initial armed assault by Celentano, it was reasonably likely to find self-defense. This is where the remainder of the Court of Appeal's summary becomes critically important: the jury was told that the victim "was not known for being physically aggressive or violent" (Opinion at 26); therefore, he was not likely to have assaulted petitioner in the manner described in petitioner's testimony. Since the evidence of celentano's non-violent character and reputation was inadmissible as a matter of law, its direct effect on the central issue at the trial rendered the trial unfair and its result unjust. See Strickland, 466 U.S. at 694.

Moreover, the determination of prejudice under Strickland requires a consideration of "the totality of the evidence before the judge or jury." Id. at 695. Viewed differently, the prejudice from this error can be properly assessed not in artificial isolation but as part of the evaluation of the entire adversarial proces at petitioner's trial. See, e.g., Parle v. Runnels, 387 F.3d 1030, 1045 (9th Cir. 2004)(cumulative effect of errors can render the trial unfair). As noted in Ground One, the state Court of Appeal found error in exclusion of evidence that Celentano became violent while withdrawing from alcohol. Opinion at 25. The court noted that this was the only evidence that would have corroborated petitioner's "sole theory to support an acquittal." Ibid. Thus, the jury was to weigh petitioner's theory of defense, erroneously deprived of corroboration, against the prosecutor's theory of the case, erroneously supported by evidence that undermined the most fundamental aspect

of the defense. In other words, the cumulative effect of the two errors was to enable the prosecutor to show that Celentano had never attacked anyone in at least 25 years and thus was not likely to have attacked petitioner, while at the same time denying petitioner the opportunity to show that the victim was prone to fits of irrational violence while experiencing alcohol withdrawal as recently as within 1½ years before he was killed, and thus likely assaulted petitioner while suffering from the same condition. This did more than undermine the credibility of petitioner's testimony: in effect, the trial lost its adversarial character and the prosecutor was allowed to make his case unopposed. This violated the concept of fundamental fairness inherent in the constitutional guarantee of due process and rendered the outcome of the trial unreliable within the meaning of Strickland, 466 U.S. at 694.

Accordingly, counsel's failure to object to introduction of evidence of the victim's character or to request a jury instruction precluding consideration thereof was prejudicial within the meaning of Strickland, the state courts' resolution of this claim was objectively unreasonable, and petitioner is entitled to habeas relief.

CONCLUSION

For all the foregoing reasons, petitioner respectfully submits that he is entitled to an evidentiary hearing and habeas corpus relief on the claims raised in the Petition.

DATED: May 18, 2008

Respectfully submitted,

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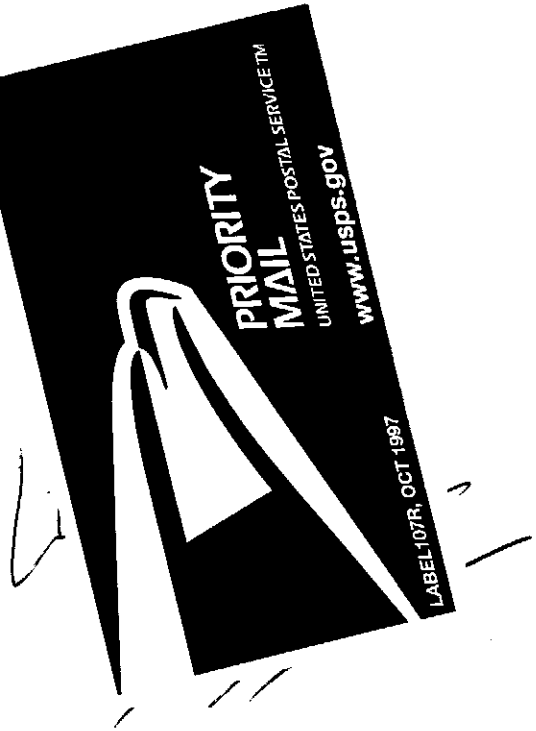

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